In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1575

JOHN D. CALLAHAN, ET AL., PETITIONERS

v.

CHARLES E. KIMBALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of May 28, 1974, inviting the Solicitor General to express the views of the United States in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 13-23) is reported at 493 F. 2d 564. The opinion of the district court (Pet. App. B, 25-26) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on February 26, 1974. The petition for a writ of certiorari was filed on April 22, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit was correct in holding that former members of the Klamath Indian Tribe did not lose their hunting and fishing rights by accepting a sum of money for their share of tribal property, in accordance with the Klamath Termination Act of August 13, 1954, as amended.

TREATY AND STATUTES INVOLVED

The Treaty of October 14, 1864, 16 Stat. 707, between the United States and the Klamath and other tribes is set forth at Pet. App. E, 36-45.

Section 5(a)(2) of the Klamath Termination Act of August 13, 1954, 68 Stat. 718, 719, as amended by Section 1(d) of the Act of August 14, 1957, 71 Stat. 347, 25 U.S.C. 564d(a)(2), reads in pertinent part as follows:

> SEC. 5. (a) The Secretary [of the Interior] is authorized and directed to select and retain by contract, at the earliest practicable time after the enactment of this Act and after consultation with the tribe at a general meeting called

for that purpose, the services of qualified management specialists who shall—

* * * * *

(2) immediately after the appraisal of the tribal property and approval of the appraisal by the Secretary, give to each member whose name appears on the final roll of the tribe an opportunity to elect to withdraw from the tribe and have his interest in tribal property converted into money and paid to him, or to remain in the tribe and participate in the tribal management plan to be prepared pursuant to paragraph (5) of this subsection; * * *.

Section 6(c) of the Act, 68 Stat. 720, 25 U.S.C. 564e(c), reads as follows:

Members of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe: *Provided*, That nothing shall prevent them from sharing in the proceeds of tribal claims against the United States.

Section 14(b) of the Act, 68 Stat. 722, 25 U.S.C. 564m(b), reads as follows:

Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

Section 2 of the Act of August 15, 1953, Pub. L. 280, 67 Stat. 588, 589, added Section 1162(b) to Title 18, U.S.C., which reads in pertinent part as follows:

Nothing in this section * * * shall deprive any Indian or any Indian tribe, band, or com-

munity of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

STATEMENT

Respondents are former members of the Klamath Indian Tribe who, like most other tribal members, exercised their option under the Klamath Termination Act to accept a cash payment for their portion of tribal property rather than continue to hold it in indivision under a private trustee (Pet. App. A, 13-14, 17-18). In order to raise the funds necessary to pay members who so elected, a large portion of the former tribal lands were sold to the United States. Those lands are now part of the Winema National Forest and the Klamath Forest National Wildlife Refuge (Pet. App. A, 14).[1] Respondents brought this suit against game officials of the State of Oregon to declare their right to hunt and fish pursuant to the Treaty of October 14, 1864, *supra*, on publicly held lands[2] within their former reservation free of Oregon fish and game regulations. The district court

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[1] The process of termination of federal supervision over the Klamath Indians is detailed in *Crain* v. *First National Bank of Oregon, Portland*, 324 F. 2d 532 (C.A. 9), and *Klamath and Modoc Tribes* v. *United States*, 436 F. 2d 1008, certiorari denied *sub nom Anderson* v. *United States*, 404 U.S. 950.

[2] Respondents do not claim the right to hunt and fish on privately held lands on which the owners prohibit hunting and fishing (Pet. App. A, 23).

dismissed the suit for failure to state a claim upon which relief could be granted.

The court of appeals, relying primarily on this Court's decision in *Menominee Tribe* v. *United States*, 391 U.S. 404, reversed.[3] It held that the Klamath Termination Act, *supra*, like the Menominee Termination Act, 68 Stat. 250, as amended, 25 U.S.C. 891-902, passed by the same Congress, must be read *in pari materia* with the Act of August 1953 (*supra*, pp. 3-4), which, in granting to some states jurisdiction over Indians, preserved Indian hunting and fishing rights (Pet. App. A, 17-20). The court noted that, in the Klamath Act, Congress not only failed clearly to indicate an intent to abrogate treaty rights; it in fact expressly preserved at least fishing rights (Pet. App. A, 22). While recognizing that the technique of termination differed from that in *Memominee* because individual Indians could elect to receive cash payments, the court found the case nonetheless controlled by *Menominee* because, here also, there was no clear congressional intent to terminate hunting and fishing rights (Pet. App. A, 20-22). The court noted that:

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[3] In *Klamath and Modoc Tribes* v. *Maison*, 338 F. 2d 620, the court of appeals had held, prior to this Court's decision in *Menominee Tribe*, *supra*, that the Klamath Termination Act abolished all special hunting and fishing rights of members of the terminated tribes. In reversing the district court here, the court of appeals noted that its reasoning in that prior case could not stand in light of this Court's decision in *Menominee Tribe*.

> Indeed, the reasoning [of] *Menominee Tribe* may be even more compelling in this case. At the hearings on the Klamath Termination bill, Senator Watkins suggested that the Government "buy out" the Indians' hunting and fishing rights rather than preserve them after termination. See Joint Hearings, Subcommittees of the Committees on Interior and Insular Affairs, 83d Cong., 2d Sess., Pt. 4, on S. 2745 and H.R. 7320, pp. 254-55. Congress did not heed this suggestion, however. * * * [Pet. App. A, 21 n. 9.]

The court of appeals consequently held that the respondents may exercise their treaty hunting, trapping, and fishing rights free of state game and fish regulations on publicly held lands within the boundaries of their former reservation and on privately held lands within those boundaries where hunting and fishing is permitted (Pet. App. A, 23).*

DISCUSSION

The decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, it does not present an issue of general importance requiring review by this Court.

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* This right, like all non-exclusive treaty hunting and fishing rights, would presumably be subject to state or federal regulation shown to be necessary for conservation of the fish or game in question or the safety of others. The court of appeals, like this Court in *Menominee*, did not reach the question of permissible regulation solely in the interest of conservation.

1. The court of appeals, in a careful opinion, with attention to the differences as well as the similarities between this case and *Menominee Tribe*, sought to apply the teachings of the Court in *Menominee* to the facts of this case. Petitioners' only real claim is that *Menominee* is inapplicable because the respondents here are Indians who, pursuant to the Klamath Termination Act, chose to "withdraw" from the terminated Klamath Tribe by "receiv[ing] the money value of their interests in tribal property * * *" [25 U.S.C. 564d(a), 564e(c)], rather than be subject to a private trustee. But, as the court of appeals held, the reasoning of *Menominee* renders this factual difference immaterial because the Klamath Termination Act does not evidence any congressional intent—much less a *clear* intent—to terminate the hunting and fishing rights secured by the Treaty of 1864 as to those beneficiaries who elected to receive payment for their share of the tribal lands. To hold that "withdrawing" members lost their hunting and fishing rights would contravene the principle upon which *Menominee* was founded: that Treaty rights cannot be abrogated by implication.

Petitioners' contention, moreover, is inconsistent with the legislative history of the Klamath Termination Act. As the Court of Appeals pointed out, Senator Watkins, the principal congressional architect of the termination statutes, suggested at the hearings on the Klamath Termination bill that the United States "buy out" the hunting and fishing rights of the members of the Klamath and Modoc

Tribes rather than preserve them after termination. See, Joint Hearings before the Subcommittees of the Committees on Interior and Insular Affairs, on S. 2745 and H.R. 7320, Indians: Termination of Federal Supervision over Certain Tribes of Indians, 83d Cong., 2d Sess., Pt. 4, pp. 254-255. This suggestion was not adopted by Congress, however.[5]

2. At all events, the case does not call for review by this Court. The decision below in no way conflicts with any decision of this Court; indeed, petitioners' complaint is really that the court of appeals followed *Menominee*. To be sure, the ruling here is inconsistent with a decision of an intermediate Oregon state court, *State* v. *Bojorcas*, 14 Ore. App. 538, 513 P.2d 813 (Ore. App.), rehearing denied, 514 P.2d 566. But that disagreement need not be resolved by this Court: presumably, Oregon will

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[5] Indeed, the Klamath Termination Act specifically provides that "[n]othing [in the Act] shall abrogate any fishing rights or privileges of the tribes or the members thereof enjoyed under Federal treaty." 25 U.S.C. 564m(b). It might be argued that the express reference to fishing rights precludes an intent to preserve hunting rights. Such a conclusion, however, would be improper as the Act merely tracks the language of the Treaty of 1864 and evidences an intent to preserve such special rights as were provided by that Treaty. See Joint Hearings, *supra*, at pp. 253-255. Post Termination Act judicial decisions have made clear that the Indians' hunting and trapping rights, as well as fishing rights, were preserved by the treaty. See, in addition to the decision below, *Klamath and Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore.). That ruling is of course consistent with this Court's holding in *Menominee*, also decided after the Termination Act, that hunting rights are inherent in Indian title.

abide by the holding of the United States Court of Appeals with respect to this federal question.[6]

No other consideration justifies further review by this Court. The question presented is of narrow applicability. All that is involved is the correct application of *Menominee Tribe* to the slightly different and unique situation presented by the Klamath Termination Act. No other case is likely to be controlled by this decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1974.

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[6] The circumstances that persuaded the Court to review the *Menominee* case were quite different. There, the highest State court was in direct conflict with the Court of Claims, which could issue no judgment binding on State officials. Moreover, this Court had not then spoken on the question.

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